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No. 99-699

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

Brief Of *Amici Curiae* American Association Of School Administrators, New York City Board Of Education, Los Angeles Unified School District, San Diego Unified School District, San Francisco Unified School District, and Laguna Beach Unified School District In Support Of Respondent

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QUESTION PRESENTED

Whether a large, unselective membership organization that has a unique relationship with the government, is sponsored by public schools and public entities of all kinds, and receives significant benefits from federal, state, and local governments, may invoke the First Amendment to defeat the application of a state's anti-discrimination law to which its governmental sponsors are subject, when none of the purposes, messages, or values that bring its members together is substantially altered or burdened by application of that state law.

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INTEREST OF AMICI CURIAE[1]

***Amicus curiae* American Association of School Administrators (AASA)**, founded in 1865, is one of the nation's oldest professional organizations for educational leaders. Its current membership consists of 15,000 school superintendents and other administrators nationwide and its mission is to support and develop the highest quality of public education and education-related programs for all children. It carries out this mission, in part, by recommending policies and standards for its members and for the educational profession as a whole. ***Amicus curiae* New York City Board of Education (NYCBOE)** is the policy-making body of the nation's largest public school system. New York City public schools have a student population of nearly 1.1 million, served by over 1,500 elementary, junior high, and senior high schools, and a budget in excess of $9 billion. ***Amicus curiae* Los Angeles Unified School District (LAUSD)** is the nation's second largest public school system. Los Angeles public schools serve more than 700,000 students in more than 900 elementary, middle, senior high and special facility schools with a budget of nearly $7.5 billion. ***Amicus curiae* San Diego Unified School District (SDUSD)** is a school district with a student population of 141,000 served by 180 schools and a budget of over $900 million. ***Amicus curiae* San Francisco Unified School District (SFUSD)** is a school district with a student population of 66,000 and a budget of over $500 million. ***Amicus curiae* Laguna Beach Unified School District (LBUSD)** is a school district with a student population of more than 2,600 students and a budget of over $17.5 million. *Amici* believe that our perspective, as educators and organizations that support educators and set educational policy, will provide a unique viewpoint on the issues in this case.

1. Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that this brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici*, their members, or their counsel make a monetary contribution to the preparation of this brief.

Discriminatory attitudes such as those exhibited by the Boy Scouts of America ("BSA" or "Boy Scouts") in expelling James Dale promote negative and harmful attitudes toward gay students in our schools. Gay teens, "whose experience has often been one of dark isolation," are beginning to find acceptance in American society.[2] John Leland, *Shades of Gay*, Newsweek, Mar. 20, 2000, at 46, 48. A recent poll indicates that most Americans now support equal rights in employment (83%) and housing (78%), and a majority support health insurance (58%) and Social Security (56%) benefits for same-sex partners. *Id.* at 48-49. Every state but Florida now allows gay adults to adopt children.[3] Ten states, in addition to New Jersey, include sexual orientation among the forms of statutorily-prohibited discrimination.[4]

Amici, as public educators and caretakers of our nation's youth, are deeply concerned, however, about the isolation and discrimination that gay youth continue to experience. One recent survey of students found the following disturbing facts about the harsh environment for gay students, and students perceived to be gay, in schools today:

2. According to recent studies, homosexual adolescents identify themselves as gay, on average, at age sixteen. Caitlin Ryan & Donna Futterman, *Lesbian & Gay Youth: Care and Counseling*, at 10 (1998). *See also* Daniela Altimari, *Refusing to Hide In the Closet*, Hartford Courant, Feb. 20, 2000, at B1 (The "age when gay people 'come out' has dropped dramatically in recent years" and is now, on average, age fifteen.).

3. *See* Margo Harakas, *Increasingly, Same-Sex Households Are Opting For Parenthood, Whether By Adoption or Other Methods*, Sun-Sentinel, May 11, 1998, at 1D (noting that in 1998 all states except New Hampshire and Florida allowed adoption by gay adults); New Hampshire House Bill 90, 1999 NJH HB 90 (enacted May 3, 1999) ("removing the prohibition on adoption and foster parenting by homosexual persons" effective July 2, 1999).

4. *See* Robert P. Lewis, *Courts Struggle With Sexual Harassment Against Homosexuals*, N.Y.L.J., Nov. 29, 1999, at 1 (listing California, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin).

> [O]ne out of every thirteen students had been assaulted or harassed because they were perceived to be gay. Four out of five of those youth . . . were actually straight. Regardless of the student's actual sexual orientation, these youth that were assaulted or harassed because they were perceived to be gay were more likely to skip school, drop out altogether, or attempt suicide. . . . In addition to direct experience with victimization, 90 percent of gay and lesbian youth reported hearing anti-gay epithets at school, 36 percent reported hearing these remarks from faculty or staff and 39 percent reported that no one ever intervened.

Press Release: Kuehl's Historic Student Protection Legislation Signed by Governor (visited Mar. 27, 2000) <http://democrats.assembly.ca.gov/members/a41/press/p4199021.htm>. Adding to the isolation they experience in schools, gay students are also frequently shunned by families, religious institutions, and organizations that provide crucial support to their heterosexual peers.

Amici are also concerned about the effect of discriminatory practices on students with gay parents. Estimates on the number of children currently under the care of same-sex parents range from four to twelve million. Margo Harakas, *Increasingly, Same-Sex Households Are Opting For Parenthood, Whether By Adoption or Other Methods*, Sun-Sentinel, May 11, 1998, at 1D. "[T]hese moms and dads have the same concerns, frustrations and dreams as any parent. Their kids are in Scouts and sports. They themselves get involved in school functions. . . ." *Id.*

As public organizations responsible for the education and welfare of *all* children, *amici* are deeply concerned about the negative ramifications for children in public school districts across the nation if a large, non-selective group such as BSA, which is so closely connected to the government, receives government funding and other government benefits, and avails

itself of so many government services, is allowed to discriminate against gay students.

SUMMARY OF ARGUMENT

The Boy Scouts are closely affiliated with government at all levels and receive special benefits from public entities of all kinds. BSA operates under charter of the federal government and reports annually to Congress. Moreover, federal, state, and local governments have enacted an array of statutes providing the Boy Scouts with privileges, including free use of facilities, free transportation, free services and supplies, income and property tax exemptions and licensing exemptions.

Public schools are one of the leading sponsors of Boy Scout troops in the country today, accounting for sponsorship of nearly 12,000 troops consisting of more than 425,000 boys. Other public sponsors include the Army, Navy, Air Force, Marines, National Guard, Coast Guard, law enforcement agencies, fire departments, and city governments. As sponsors, these public entities provide facilities, funding and leadership to Boy Scout troops. BSA's extensive relationships with federal, state, and local governments are an important factor in assessing BSA's claims that the New Jersey Law Against Discrimination (the "LAD") infringes upon BSA's First Amendment freedom of expressive association and intimate association.

The LAD does not infringe upon BSA's freedom of expressive association because BSA lacks a purpose of promoting the view that homosexuality is immoral. Scouting has never had any purpose that required the exclusion of gay members or leaders. Indeed, consistent with the policies of public schools and other public entities with which BSA is affiliated, BSA has always been committed to having a diverse and representative membership of boys across the country. If the expressive purposes of the Boy Scouts required the exclusion of gay members and leaders, BSA surely would neither seek nor be able to obtain financial assistance, sponsorships, and other privileges from government entities such as public schools that are prohibited by law, as well as their own official policies,

from discriminating on the basis of sexual orientation. The Boy Scouts have solicited and accepted sponsorships from these public institutions, along with a wide array of other government benefits. Having done so, BSA cannot now claim that it has an expressive purpose that is contrary to the purposes and policies of the public entities with which it is affiliated.

Alternatively, BSA is so entangled with federal, state, and local governments that, even if its First Amendment associational rights were implicated here, BSA can claim only minimal protection of such rights. Just as a commercial group avails itself of the benefits of the marketplace and thereby forgoes some of its First Amendment protections, an organization such as BSA, which has availed itself of the many benefits flowing from its government associations, must forego certain membership restrictions otherwise available to truly private organizations. BSA cannot have it both ways — being public for purposes of receiving publicly funded sponsorships and privileges, and private when it wishes to discriminate. BSA has entered the public arena and must play by its rules.

Nor does the LAD infringe upon BSA's freedom of intimate association because membership in BSA is not the kind of intimate or private relationship that the First Amendment is intended to protect. In addition to its large size and lack of selectivity, BSA's complex network of government affiliations demonstrates that BSA is not the intimate or private organization that it claims to be. BSA operates in public schools and other public facilities across the country in close affiliation with public entities of all kinds. BSA itself promotes extensively its government ties in an effort to recruit new Scouts and volunteers. In doing so, BSA has taken on a public character that directly controverts any claim of intimate association.

Finally, the Court should not expand First Amendment rights to intrude upon state sovereignty. If BSA were permitted to hide behind the veil of the First Amendment, the states would be rendered powerless to combat discrimination in many forms.

This Court should reaffirm its commitment to state sovereignty by holding that states such as New Jersey may protect their citizens from invidious discrimination in places or organizations of public accommodation such as the Boy Scouts of America.

ARGUMENT

A. BSA's Extensive Entanglement With Government Endows It With A Public Character Not Shared By Other Organizations.

BSA claims that it is "neither public nor quasi-commercial" and asserts that if it were subjected to the LAD, then "virtually all contested membership and leadership decisions" of all private organizations would be subject to anti-discrimination laws as well. Pet. Br. 37-38. On the contrary, BSA's extensive entanglement with every level of government endows BSA with a uniquely public character that is not shared by other organizations. It is only through BSA's relationship with the government that BSA has achieved its enormous size and has gained such a pervasive influence in this country.

1. BSA Has an Extensive Relationship With The Federal Government.

Since its inception, BSA has been closely affiliated with the federal government. In 1916, Congress granted BSA a federal charter in recognition of its service to the military and government as an "auxiliary force in the maintenance of public order." H.R. Rep. No. 64-130, at 2 (1916). *See* 36 U.S.C. § 30901 (Supp. IV 1994). BSA's charter requires BSA to report directly to the federal government by submitting an annual report to Congress detailing BSA's activities for the prior year. 36 U.S.C. §§ 30907-08 (Supp. IV 1994). The President of the United States is the Honorary President of BSA, and has traditionally addressed a group of Boy Scouts every four years. *See* BSA, *1996 Annual Report*, at 36; *Historical Highlights: More Than 80 Years of Scouting in America* (visited Mar. 27, 2000) <http://www.scouting.org/factsheets/02-511/1980.html>. BSA's Report to the Nation is presented annually to the executive branch and both houses of Congress. *Press Releases: Scouts Present Report to the Nation* (visited Mar. 27, 2000) <http://www.scouting.org/press/990422/index.html>. BSA's charter also provides perpetual protection — above and beyond federal patent, copyright and trademark law — for the Boy Scouts' emblems, badges, and other descriptive marks. 36 U.S.C. § 30905 (Supp. IV 1994).

In addition to the charter, the federal government has enacted an array of statutes to confer various benefits on BSA. For example, the Boy Scouts are authorized by statute to receive free services and medical supplies from the federal government. 10 U.S.C. § 2544 (Supp. IV 1994). The Secretary of Defense and "[o]ther departments of the federal government" are authorized to lend equipment to the Boy Scouts for use at Boy Scout Jamborees. *Id.* The Navy, Marines, and Coast Guard are authorized to give materials to the Boy Scouts. *Id.* at § 7541; 14 U.S.C. at § 641 (Supp. IV 1994). BSA is entitled to purchase excess material from the Army (10 U.S.C. § 4682 (Supp. IV 1994)), Navy (*Id.* § 7541), Air Force (*Id.* § 9682), Marines (*Id.* § 7541), and Coast Guard (14 U.S.C. § 641 (Supp. IV 1994)). BSA is also entitled to assistance from the National Guard, ranging from transportation to emergency medical services to use of facilities. 32 U.S.C. § 508 (Supp. IV 1994).[5]

The federal government provides other forms of assistance to the Boy Scouts as well. For example, since 1981, Fort A.P.

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5. Other federal statutes providing assistance and benefits to the Boy Scouts include 36 U.S.C. § 40731 (Supp. IV 1994) (authorizing BSA to borrow firearms and supplies, with or without charge, from the Corporation for the Promotion of Rifle Practice and Firearms Safety); 16 U.S.C. § 539f (Supp. IV 1994) (authorizing the Secretary of Agriculture to waive all or a portion of the fees due to the federal government for the use of national forest land as Boy Scout camps); and 10 U.S.C. § 2606 (Supp. IV 1994) (authorizing the Secretary of Defense to cooperate with the Boy Scouts to establish scouting facilities and services for military personnel overseas, authorizing the Boy Scouts to receive free transportation, office space, warehousing, utilities, and means of communication, and to receive reimbursement for the pay of Boy Scout personnel performing services overseas).

Hill, a 76,000-acre U.S. Army facility in Virginia, has served as the permanent site for the National Scout Jamboree. *2001 National Scout Jamboree: Location and Site* (visited Mar. 27, 2000) <http://www.scouting.org/jamboree/location.html>. During the 2001 Jamboree, Fort A.P. Hill will support "a city of nearly 38,000 Scouts and leaders" complete with buses, telephones, a hospital, police and fire stations, post offices, food warehouses, a daily newspaper and retail stores. *Id.* The Jamboree, traditionally held every four years, enlists the aid of thousands of U.S. service members from the Army, Air Force, Navy and National Guard, who — at taxpayers' expense — do everything from set up the Jamboree and run adventure areas to help Scouts earn badges and entertain the Scouts with drill teams, color guards and parachute jumpers. Jim Garamone, *Service Members Build, Run Scout City* (visited Mar. 27, 2000) <http://boyscout.home.texas.net/CITY01.html>.

The federal government has also partnered with BSA in various conservation initiatives. For example, BSA's leaders are working directly with National Park Service personnel to coordinate environmental conservation projects in National Parks. *Press Releases: The Boy Scouts of America Delivering the Promise* (visited Mar. 27, 2000) <http://www.scouting.org/press/990815/index.html>. As part of this project, Scouts will earn a commemorative patch from the National Park Service. *Id.* BSA has also partnered with the federal government in the TRAIL Boss program which was jointly developed by BSA and the U.S. Forest Service, Bureau of Land Management, U.S. Army Corps of Engineers, U.S. Soil Conservation Service, U.S. Environmental Protection Agency, National Park Service and U.S. Fish and Wildlife Service to train leaders of volunteer organizations in skills needed to lead conservation and public service projects. BSA, *1992 Annual Report*, at 7.

2. BSA Has Extensive Relationships With State Governments.

In addition to its longstanding ties to the federal government, BSA also maintains close relationships with state governments. Through those relationships, BSA receives a wide range of special privileges and benefits. In New Jersey, for example, the legislature has exempted from state taxation real and personal property used for the purposes of the Boy Scouts. N.J. Stat. Ann. § 54:4-3.24 (West 1999). New Jersey has also exempted BSA from registration fees for motor vehicles owned by local councils of the Boy Scouts, *id.* at 39:3-27, and from paying taxes on fuel used in motor vessels used for Sea Scout training, *id.* at 54:39-66. New Jersey has even authorized its Board of Fish and Game to stock with fish any body of water "that is under the control of and for the use of . . . the Boy Scouts." *Id.* at 23:2-3. Tax advantages like those granted by New Jersey are common features of state tax codes across the country.[6]

3. Public Entities Sponsor and Provide Facilities For Boy Scout Troops.

Federal, state and local governments are major sponsors of Boy Scout troops. The U.S. Air Force, Army, Navy, Marines, National Guard (Army and Air), Coast Guard, and Department of Housing and Urban Development sponsor troops throughout the country. *Chartered Organizations and the Boy Scouts of America*, BSA External Comm. Div., Pub. No. 2-507 (1999); *Chartered Organizations: Top 30 For 1997 Ranked By Total Youth*, BSA Today, No. 50886, Feb./Mar. 1998 ("*Chartered Organizations: Top 30*"). In addition, law enforcement agencies and fire departments sponsor nearly 7,000 troops and 132,847 youth members in the U.S. *Chartered Organizations: Top 30.*

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6. *See, e.g.*, Ala. Code § 40-9-12 (West 1999); Cal. Rev. & Tax Code § 6361 (West 1999); Ind. Code Ann. § 6-1.1-10-25 (West 1999); Md. Code Ann. Tax-Prop. § 7-233 (West 1999); Okla. Stat. Ann. Tit. 63, § 1356 (West 1999); W. Va. Code § 11-15-9 (West 1999); Wis. Stat. Ann. § 70.11 (West 1999).

Even BSA admits that nearly "10 percent of [Boy Scout troops] are chartered to public institutions." *See* Pet. Br. at 3.

Public schools are among the leading sponsors of Boy Scouts in the country. For example, in 1997, public schools ranked first nationally among all sponsoring organizations in total youth membership. *Chartered Organizations: Top 30* (reporting that public schools sponsor 11,863 Boy Scout troops and 427,842 youth members). *See also Facts About Scouting*, Boy Scout Pub. No. 02-179 (1999) (public schools ranked third nationally among all chartered organizations in the country). In New Jersey alone, public schools and school-affiliated groups sponsor nearly 500 troops, approximately one-fifth of the troops in that state. *Dale v. Boy Scouts of America*, 734 A.2d 1196, 1201 (N.J. 1999).

Public entities that sponsor Boy Scout troops are intimately involved in the operation of these troops. According to BSA, each troop is "locally owned and operated by its [sponsoring] organization." BSA, *1991 Annual Report*, at 13. BSA explains that "BSA really doesn't have any packs or troops, just a unique program chartered to local organizations that deliver Scouting to boys of the community." BSA, *1997 School Night to Join Scouting/Join Scouting Night Guidebook* ("*Join Scouting Guidebook*"). Thus, many troops are owned and operated by federal, state and local government agencies, including public schools. These sponsoring organizations are responsible for providing a meeting place and support for troop activities, as well as the adult leadership for the troops. *See What is Boy Scouting* (visited Mar. 27, 2000) <http://www.scouting.org/factsheets/02-503.html>; *Chartered Organizations and the BSA* (visited Mar. 27, 2000) <http://www.scouting.org/factsheets/02-507.html>.

In addition to sponsoring Boy Scout troops, public schools across the nation make their facilities and resources available to BSA for meetings, activities, and recruiting. According to BSA, "[m]ore and more of our schools are becoming available

for other than formal education. . . . In-school Scouting, where the pack, troop, team, or post meets during the school day, is recognized in many areas." *Organizations That Use Scouting*, BSA Pub. No. 3041C (1989), at 7. BSA also boasts that their after-school programs meet the "educational concerns" of parents in that BSA volunteers include "[d]edicated educators [who] are always willing to give unselfishly of themselves when it comes to youngsters" and who even "supervise homework sessions before beginning Scouting activities." BSA, *1996 Annual Report*, at 10-11. Indeed, recruiting in public schools "is standard practice throughout the nation" for BSA. *Across the USA: News From Every State*, USA Today, Oct. 12, 1999, at 12A; *see also Join Scouting Guidebook* (inviting "[a]ll boys and their parents . . . to the elementary school nearest their homes to learn about Scouting"). BSA uses public schools as a fertile ground for recruitment, asserting that "[t]he education field holds our greatest potential." *Organizations That Use Scouting*, at 7.

Many public school districts with which BSA interacts, including *amici*, have official policies prohibiting discrimination on the basis of sexual orientation. For example, NYCBOE has a longstanding policy of providing educational opportunities without regard to sexual orientation, and expressly prohibits organizations using school facilities from "exclud[ing] persons on the basis of race, religion or any other impermissibly discriminatory reason," including sexual orientation. *See* NYCBOE, *Standard Operating Procedures*, § 5.25 (Apr. 1990); *see also Policy Against Bias and Discrimination in All Facilities and at All Levels of the NYCBOE* (adopted Apr. 28, 1993). Similarly, LBUSD requires that its "programs and activities shall be free from discrimination . . . with respect to . . . sexual orientation" and conditions the use of its facilities on adherence to policies and regulations precluding "[a]ny use which is discriminatory in the legal sense," which, in California, includes discrimination on the basis of sexual orientation. *See* LBUSD Bd. Policy 4030(a) (adopted Apr. 12, 1994);

LBUSD Admin. Reg. 1330(b) (adopted Apr. 12, 1994); Cal. Educ. Code § 200 (West 2000).[7]

4. Public Entities Support BSA's Learning For Life and Explorer Programs.

"Learning for Life" is a classroom-based program created by the Boy Scouts that is conducted on public school grounds, during class time, using school personnel. *See Learning for Life Programs — Program Methods* (visited Mar. 27, 2000) <http://www.ocbsa.org/ocbsa/scouting_program/learning/

7. *See also* L.A. Bd. of Educ. Resolution, *Respectful Treatment of All Persons* (adopted Oct. 10, 1998) (reaffirming "policy that students and adults in both schools and offices should treat all persons equally and respectfully and refrain from the willful or negligent use of slurs against any person on the basis of . . . sexual orientation"); LAUSD *Sexual Harassment Policy/Procedures*, Education Equity Office/General Counsel, Bulletin No. L-5, July 30, 1998 (protecting gay and lesbian students and staff from discrimination); S.D. Bd. of Educ. Policy No. A-3500 (revised Dec. 1, 1992) (stating that "[n]o student shall be excluded from participation in, be denied the benefits of, or otherwise be discriminated against in district educational programs by reason of his/her . . . sexual orientation"); S.F. Bd. of Educ., Res. No. 18-13A6, Policy No. P5163 (adopted Sept. 12, 1991) (mandating that SFUSD "shall not discriminate on the basis of . . . sexual orientation . . . in the provision of educational programs, services and activities"). Public schools in California are also subject to the Student Safety and Violence Prevention Act of 2000, which prohibits discrimination against any student on the basis of sexual orientation. Cal. Educ. Code § 200 (West 2000). The National School Boards Association, which represents 95,000 school board members governing nearly 15,000 school districts across all 50 states, includes in its Beliefs and Policies the mandate that local school boards "should ensure that students are not subjected to discrimination on the basis of . . . sexual orientation." NSBA, Beliefs & Policies, Art. II, § 3.4 (adopted Apr. 1999). Likewise, AASA's Year 2000 Diversity Resolution instructs that children should be taught "that diversity is not something to fear" but that "differences are regarded as exciting opportunities for enrichment," and recommends that school districts address the issue of sexual orientation discrimination on their campuses. AASA, 2000 Platform and Resolutions, Resolution XI.

programmethods.html>. The program provides lesson plans for use by teachers in kindergarten through high school, and is designed to "develop social and life skills, [assist] in character development, and help[] [children] formulate positive values." *Learning for Life* (visited Mar. 27, 2000) <http://www.learning-for-life.com/lfl/about/main.html>. Learning for Life, which is funded substantially by government, now operates in more than 20,000 schools and organizations nationwide, serving 1.4 million youths. *See Learning for Life* (visited Mar. 27, 2000) <http://www.learning-for-life.com/lfl/about/main.html>; Adam C. Smith, *Ministers: Scouts' Values Inappropriate*, St. Petersburg Times, Oct. 12, 1999, at 1B; Dean Geroulis, *Boy Scouts to Get Money to Start School Program on Values*, Chi. Trib., Sept. 21, 1999.

BSA's "Explorer" program is a worksite-based program that is part of "Learning for Life's career education program" for young men and women who are 14 to 20 years old. *Exploring* (visited Mar. 27, 2000) <http://www.learning-for-life.com/exploring/main.html>. The program is operated in conjunction with law enforcement agencies, fire departments and other community organizations across the country. *What is Exploring?* (visited Mar. 27, 2000) <http://www.learning-for-life.com/exploring/index.html>. For example, in New York City, 3,200 Boy Scout Explorers "get weekly immersion in law enforcement groups that also include New York's transit and housing police, and the Drug Enforcement Authority, FBI, Secret Service, and U.S. Customs Service." BSA, *1996 Annual Report*, at 5. BSA boasts that over 90% of all police precincts in New York City have Boy Scout Explorer programs. *Id.* at 4.

5. BSA Relies Upon Its Relationships With Government To Promote Its Organization.

BSA promotes its extensive ties to the government in recruiting new scouts and volunteers. For example, BSA devotes a significant portion of its website to describing its relationships with U.S. Presidents, Congressmen, and other public officials. *See, e.g., Historical Highlights* (visited Mar. 27, 2000) <http://

www.scouting.org/factsheets/02-511/index.html>; *The Congress and Scouting* (visited Mar. 27, 2000) <http://www.scouting.org/factsheets/02-571.html>. In promoting its many government affiliations, BSA has attracted countless boys and young adults to its program. It is beyond doubt that BSA's ties to the government have helped the organization achieve its ubiquitous presence in American culture and a pervasive influence on American youth.

In summary, BSA's connections with governments at all levels are complex and far-reaching. No truly private organization is anything like the Boy Scouts, with its many layers of entanglement with federal, state and local governments. BSA's entanglement with government is an important factor in evaluating BSA's claims that the LAD violates the Boy Scouts' right of expressive association and its right of intimate association.[8]

B. Application of the LAD to BSA's Discriminatory Practices Does Not Infringe Upon BSA's Freedom of Expressive Association.

Contrary to BSA's contention, the LAD does not infringe upon BSA's freedom of expressive association. In *Roberts v. Minnesota Dep't of Human Rights*, 468 U.S. 609 (1984), *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), and *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988), this Court set forth the framework for analyzing the degree to which the First Amendment right to expressive association shields a group from state anti-discrimination laws. Under this framework, a group must show that it has "specific expressive purposes," *New York State Club Ass'n*, 487 U.S. at 13, and that application of the state law to its discriminatory practices

8. In addition, BSA's extensive entanglement with government controverts BSA's claim that the New Jersey Supreme Court was wrong in extending the LAD to the Boy Scouts' discriminatory practices. *See* Pet. Br. 37-38. An examination of the overwhelming number and character of BSA's relationships with government demonstrates that it is not only appropriate but, indeed, obvious that BSA is a "public accommodation" subject to the LAD.

would impose such "serious burdens" on these specific expressive purposes, *Roberts*, 468 U.S. at 626, that the group's members would be forced to "abandon or alter" their expressive activities or "abandon their basic goals." *Rotary*, 481 U.S. at 548.

Applying this framework to BSA, the New Jersey Supreme Court correctly found that the LAD does not infringe upon BSA's expressive associational rights "because the statute does not have a significant impact on Boy Scout members' ability to associate with one another in pursuit of shared views." *Dale*, 734 A.2d at 1223. The court was "not persuaded . . . that a 'shared goal[]' of Boy Scout members is to associate in order to preserve the view that homosexuality is immoral." *Id.* at 1224-25 (citing *Roberts*, 468 U.S. at 622).

1. BSA Does Not Have an Expressive Purpose of Promoting the View That Homosexuality Is Immoral.

If one of BSA's expressive purposes were to teach children that homosexuality is immoral, *amici*, having sponsored or facilitated Boy Scout troops, would know about it.[9] Our schools are familiar with the principles taught by the Boy Scouts. Those principles simply do not include moral condemnation of homosexuality. To the contrary, consistent with the policies of *amici* and other educational institutions with which BSA has long been associated, BSA has always

9. Schools under the supervision of the NYCBOE make school facilities available to the Boy Scouts after school hours by permit, and some allow the Boy Scouts to recruit on campus. Schools in the LAUSD make school facilities available to the Boy Scouts after school hours by permit. Schools in the SDUSD participated in the Boy Scouts' Learning for Life program until 1993 and continue to make school facilities available to the Boy Scouts after school hours. Schools in the SFUSD make school facilities available to the Boy Scouts after school hours by permit. Schools in the LBUSD make school facilities available to the Boy Scouts after school hours and allow the Boy Scouts to recruit on campus during school hours.

been committed to the inclusion of a "diverse and 'representative' membership."[10] *Dale*, 734 A.2d at 1226. Throughout its literature, advertisements and promotional materials, BSA holds itself out as being available to *all boys*, not just heterosexual boys. *See, e.g.*, Boy Scouts of America, *The Boy Scout Handbook, passim* (11th Ed., 1998); *1997 Join Scouting Guidebook*.[11]

If the expressive purposes of the Boy Scouts required the exclusion of homosexuals, BSA surely would not seek financial support and sponsorship from public entities that are prohibited by law and by official policy from discriminating on the basis of sexual orientation. Public entities in New Jersey, including public schools, "are, of course, bound by the LAD." *Dale*, 734 A.2d at 1213 n.7. "Their sponsorship of, or conferring of special benefits on, an organization that practices discrimination would be prohibited." *Id.* Moreover, as previously explained, many public entities such as *amici* have internal policies prohibiting sexual orientation discrimination and would not confer benefits on an organization that practices such discrimination in contravention of their own regulations.

Knowing that many government institutions are subject to anti-discrimination laws and internal policies prohibiting sexual

10. Nowhere does the Boy Scout Handbook, in summarizing "all you need to do to become a Boy Scout," require that a boy be heterosexual. BSA, *The Boy Scout Handbook*, at 4 (11th ed. 1998).

11. Further evidence that BSA lacks a core discriminatory purpose is that BSA has continued to allow troops to operate despite their non-compliance with BSA's anti-gay position. For example, BSA renewed the charter of Troop 260 in San Jose, California, despite the troop's announcement that "it would accept gay people as Scouts and leaders." *See Defiant Scout Troop Gets Charter*, The Courier-Journal (Louisville, KY), Feb. 23, 1992, at 10A. In addition, Boy Scout troops that have voiced opposition to BSA's discriminatory policy have been permitted to continue operating their troops. *See, e.g., Editorial: Local Scouts Set Example*, The Providence Journal-Bulletin, Nov. 28, 1999, at 10F (The Rhode Island and Minnesota chapters of BSA oppose and have urged reconsideration of BSA's anti-gay position.).

orientation discrimination, BSA nevertheless continues to affiliate with these public entities and to use their facilities for programs, troop meetings, and recruiting. For example, in New York City, where BSA boasts that over 90% of all police precincts have Boy Scout Explorer programs, the police department is prohibited by New York City law from discriminating on the basis of sexual orientation. *See* N.Y. Admin. Code § 8-107; BSA, *1996 Annual Report*, at 4.

BSA also holds meetings, recruits members, and operates its Learning For Life program in public schools that are subject to laws and internal policies that prohibit discrimination on the basis of sexual orientation. In some cases, the Boy Scouts' use of public school facilities is expressly conditioned on adherence to the schools' anti-discrimination policies. For example, in New York City, the Boy Scouts have *expressly agreed*, in order to obtain the use of public school facilities after hours, that they will abide by NYCBOE policies banning discrimination.[12] From 1994 to 1999, NYCBOE issued to the Boy Scouts at least 265 permits to use school facilities for Boy Scout activities, and each time the Boy Scouts signed a permit, they expressly agreed to comply with NYCBOE regulations. *See NYCBOE Permit Application — School Buildings*, Form No. 25-2751.00.0 (6/92). Thus, on average, once a week for the past five years, the Boy Scouts have signed such a permit application and thereby agreed to adhere to the NYCBOE's anti-discrimination policy.

12. Organizations such as BSA are permitted to use New York City public school facilities after hours provided that "such meetings, entertainment and uses shall be non-exclusive and shall be open to the general public" and subject to NYCBOE regulations governing such use. N.Y.C. Educ. Law, tit. 1, art. 9, § 414(1)(c). NYCBOE regulations expressly prohibit organizations using school facilities from "exclud[ing] persons on the basis of race, religion or any other impermissibly discriminatory reason," including sexual orientation. *See* NYCBOE, *Standard Operating Procedures*, § 5.25 (Apr. 1990); *see also Policy Against Bias and Discrimination In All Facilities and At all Levels of the NYCBOE* (adopted Apr. 28, 1993).

Similarly, in San Francisco, in order to use public school facilities, the Boy Scouts have signed permit applications in which they have *expressly agreed* to abide by SFUSD rules and regulations, which prohibit sexual orientation discrimination. *See* SFUSD, Application and Permit for the Use of School Property. Moreover, in Los Angeles, Boy Scouts who use school facilities after hours sign permit applications in which they agree that "[m]eetings shall be non-exclusive and shall be open to, and of interest to, the general public." *See* LAUSD Application For Use of School Facilities, Form No. 30.11 (rev. 03/93). Likewise, in Laguna Beach, Boy Scout troops conduct meetings and activities in public school facilities, even though the LBUSD conditions the use of its facilities on adherence to policies and regulations precluding "[a]ny use which is discriminatory in the legal sense," which, in California, includes discrimination on the basis of sexual orientation. *See* LBUSD Admin. Reg. 1330(b); Cal. Educ. Code § 200 (West 2000).

In sum, the Boy Scouts have collaborated with public schools, including *amici*, that have policies prohibiting sexual orientation discrimination and are subject to state anti-discrimination laws. The Boy Scouts have accepted privileges from New Jersey and other states that have anti-discrimination laws. The Boy Scouts have solicited sponsorships from public entities that then provide leadership to members under the Boy Scout banner. Having established such an extensive network of associations with governments at all levels, the Boy Scouts cannot now claim to have an expressive purpose contrary to the laws and policies to which BSA's public sponsors and collaborators are subject.[13]

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13. Even if BSA somehow could show that it has an expressive purpose of promoting the view that homosexuality is immoral and that the LAD infringes upon that purpose, any burden on BSA's First Amendment rights would be outweighed by New Jersey's compelling interest in eradicating discrimination. The LAD "plainly serves compelling state interests of the highest order" since "acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent." *See Roberts*, 468 U.S. at 628.

2. BSA's Argument that the LAD Impermissibly Infringes on Its Freedom of Association, If Accepted, Would Require a Radical Departure From Established First Amendment Jurisprudence and Would Render Civil Rights Laws Virtually Meaningless.

Having failed to prove that its discriminatory practices further an expressive purpose of the organization, BSA advances several alternative arguments in an attempt to circumvent this threshold requirement. If, however, BSA were to obtain an exemption from the LAD on First Amendment grounds without proving an infringement upon an expressive purpose, civil rights laws would be eviscerated.

(a) *Hurley* Does Not Apply To This Case.

First, BSA argues that *Hurley* should control this case, rather than *Roberts* and its progeny. *See* Pet. Br. 22-30. *Hurley*, however, involved the application of an anti-discrimination statute to the "inherent[ly] expressive[]" activity of marching in a parade. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995). In holding that application of an anti-discrimination statute to a St. Patrick's Day parade violated the parade's rights of free speech, the Court compared the act of marching in a parade to a demonstration or a protest march, which are by nature expressive activities. *Id.* at 568, 576. The Court noted that "a parade's dependence on watchers is so extreme" that "if a parade or demonstration receives no media coverage, it may as well not have happened." *Id.* at 568. In contrast, BSA was not formed for the purpose of engaging in speech. BSA was organized to teach boys scouting skills, independence and self-sufficiency. *See* 36 U.S.C. § 30902 (Supp. IV 1994); H.R. Rep. No. 64-506 (1916).

In addition to focusing on the expressive nature of the parade, the Court in *Hurley* examined the purpose of the gay rights organization in seeking to march in the parade. The Court found that the organization's participation was "equally

expressive" because the organization was formed for the very purpose of marching in the parade, and intended to do so to promote a message that there are openly gay, lesbian, and bisexual descendants of Irish immigrants in the community. *Hurley*, 515 U.S. at 570. In contrast, Dale did not join the Boy Scouts for the purpose of propounding a pro-gay philosophy. Dale became a member of the Boy Scouts when he was eight years old. *Dale*, 734 A.2d at 1204. He remained a member of the Boy Scouts for a decade until he was expelled at age eighteen, and has never had a purpose of speaking to other Scouts about any topic relating to sexuality. *Id.* at 1225. Thus, BSA's attempt to fit this case within the framework of *Hurley* not only requires a stretch of the imagination but also a drastic departure from established First Amendment precedent.[14]

(b) If the Court Were to "Give Deference" To BSA's Own Characterization of Its Expressive Purpose, Any Organization Could Become Exempt From Civil Rights Laws By Professing a Purpose To Justify Its Discrimination After the Fact.

BSA also argues that the Court "must give deference" to BSA's own characterization of its beliefs and accept at face value

14. BSA's contention that it should receive First Amendment protection of its discriminatory conduct, if accepted, would also erode the holding of *Runyon v. McCrary*, 427 U.S. 160, 176 (1976). There, the Court held that a federal statute prohibiting racial discrimination did not impermissibly infringe upon the schools' freedom of expressive association because, while the statute prohibited the schools from excluding blacks, the schools could still promote the view that racial segregation is proper. Although the LAD prohibits BSA from excluding members and leaders based on sexual orientation, BSA remains "free to inculcate whatever values and standards [it] deem[s] desirable" for scouting. *See id.* at 177. As in *Runyon*, BSA has not shown that discontinuance of its discriminatory practices "would inhibit in any way the teaching . . . of any ideas or dogma," and BSA's discriminatory practices therefore should not be exempted from the LAD on First Amendment grounds. *See id.* at 176.

BSA's contention that it has an expressive purpose that requires the exclusion of homosexuals. *See* Pet. Br. 26. This argument, if accepted, would render civil rights laws virtually meaningless. If the Court were to defer to an organization's self-serving statements about its professed purposes, any organization could claim, after the fact, to have a racist or sexist or anti-gay purpose and automatically be exempt from civil rights laws. An organization's expulsion of a member could in itself be used to show that the member's beliefs conflict with the organization's "expressive purpose." The determination of whether BSA has an expressive purpose of promoting an anti-gay message must be made on the facts, not on BSA's bare assertion of such a purpose. The facts reveal that BSA's characterization of itself as an anti-gay, quasi-religious organization is in blatant conflict with reality.

(c) BSA's "Leadership" Decisions Are Subject to the Same Analysis as BSA's "Membership" Decisions.

BSA also suggests that the First Amendment should provide *unqualified* protection to BSA's right to choose its leaders. Pet. Br. 34. This contention has no support in First Amendment jurisprudence, and creates a false distinction between members on the one hand and Scout leaders on the other.

The "leadership" of the Boy Scouts is an amorphous category that BSA itself neglects to define. Each of the million plus adult "Volunteers" across the nation that participates in scouting arguably falls within the category of BSA "leadership."[15] *See Fact Sheet: What Is Boy Scouting?* (visited Mar. 27, 2000) <http://www.bsa.scouting.org/factsheets/02-503.html>; *Fact Sheet: What Is Cub Scouting?* (visited Mar. 27, 2000) <http://www.bsa.scouting.org/factsheets/02-502.html>. These volunteer leaders "serve in a variety of jobs — everything from unit leaders to chairmen of troop committees, committee members, merit badge counselors, and chartered

15. James Dale's membership as an adult Volunteer leader was revoked on March 21, 1989. *Dale*, 734 A.2d at 1196.

organization representatives." *Fact Sheet: What Is Boy Scouting?* (visited Mar. 27, 2000) <http://www.bsa.scouting.org/factsheets/02-503.html>.

Presumably, Boy Scout "leaders" would also include the elite division of Eagle Scouts achieved by fewer than 4% of all Scouts, including James Dale. *The Boy Scout Handbook* at 179. The qualifications for becoming an Eagle Scout include serving for 6 months in one or more "positions of responsibility" such as patrol leader, senior patrol leader or troop guide. *The Boy Scout Handbook* at 180-81.

BSA encourages other Scouts to be "leaders" as well. *See What is Boy Scouting? Leadership Development* (visited Mar. 27, 2000) <http://www.scouting.org/factsheets/02-503.html> ("Every Boy Scout has the opportunity to participate in both shared and total leadership situations."). As boys move through the ranks of Scouting, they are encouraged at every stage to be "leaders" to other boys within their troop. *See The Boy Scout Handbook* at 172. The Boy Scout Handbook instructs that the "leadership positions" available to a Boy Scout within his troop include Senior Patrol Leader, Assistant Senior Patrol Leader, Patrol Leader, Order of the Arrow Troop Representative, Instructor, Troop Guide, Quartermaster, Den Chief and Junior Assistant Scoutmaster, in addition to "leadership positions for special projects or events" that a boy's Scoutmaster may offer him. *Id.* Thus, the Boy Scouts includes millions of adults and senior scouts who serve in some type of leadership capacity, making it is impossible to draw a meaningful distinction between Boy Scout "leaders" on the one hand and Boy Scout "members" on the other.

Moreover, BSA's distinction is irrelevant to established First Amendment precedent. The protections of the First Amendment extend to the decisions of an organization to choose *both* its leaders *and* its members, as long as that organization can show that it has an expressive purpose that is burdened by the anti-discrimination statute. *See Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224 (1989)

(overturning restrictions on political parties that infringed upon their right to "identify[] the people who constitute the association" and to choose their own leaders). Having failed to establish that it has an expressive purpose that is burdened by the LAD, BSA cannot now carve out a new exception to civil rights laws for its discriminatory "leadership" decisions.

Finally, BSA should have no more right to discriminate in its "leadership" decisions than public schools, including *amici*, and other public agencies with which BSA is affiliated. The LAD and similar anti-discrimination statutes prohibit public schools and governmental agencies from discriminating on the basis of sexual orientation in hiring teachers, administrators and other adult "leaders." *See, e.g.*, N.J. Stat. Ann. § 10:5-4 (West 1999) ("All persons shall have the opportunity to obtain employment . . . [in] any place of public accommodation . . . without discrimination because of . . . sexual orientation."); Cal. Gov. Code § 12940 (West 1999) ("It shall be unlawful . . . [f]or any employer, because of the . . . sexual orientation of any person, to refuse to hire or employ the person."). BSA should be subject to the same rules as the schools and other public entities that sponsor the Boy Scouts and provide them with funding, facilities and numerous other benefits.

3. Because BSA is Extensively Entangled With Government, BSA Can Claim Only Minimal Protection of Its Right of Expressive Association.

Even if this Court finds that the LAD, as applied to the Boy Scouts, does not meet the standard enunciated in *Roberts* and its progeny, BSA is so entangled with federal, state, and local governments that it can claim only minimal protection of its associational rights under the First Amendment.

In other contexts, this Court has considered the degree to which an individual or organization is entangled with the government in determining whether that individual or organization may be subject to various restrictions on speech. At one extreme, government entities and their agents receive little or no First Amendment protection because " 'nothing in

the [First Amendment] guarantee precludes the government from controlling its own expression or that of its agents.' " *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 139-140 n.7 (1973) (Stewart, J., concurring) (quoting Professor Thomas Emerson, *The System of Freedom of Expression* 700 (1970)). Thus, the Court has upheld statutes that restrict the political activities of government employees, even when those activities take place outside of the workplace and during non-working hours. *See, e.g., United States Civil Serv. Comm'n v. National Assoc. of Letter Carriers AFL-CIO*, 413 U.S. 548 (1973) (upholding the Hatch Act), *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (upholding a state statute restricting political activities of state employees), *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 95 (1947) (upholding the Hatch Act against First Amendment challenge).

The Court has also allowed greater restriction on the speech of private organizations and individuals that are associated with the government. *See, e.g., Lebron v. National R. R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (holding that, for the purposes of deciding whether a privately owned railroad could be required to accept political advertisements, the railroad was so intertwined with the government that it was "part of the Government for purposes of the First Amendment"). For example, in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033 (1991), the Court held that the speech of lawyers "may be regulated under a less demanding standard than for regulation of the press" because "lawyers are key participants in the criminal justice system, [so] the State may demand some adherence to the precepts of that system in regulating their speech." 501 U.S. at 1074 (upholding state court rule prohibiting lawyers from making extrajudicial statements).

The Court went further in *Rust v. Sullivan*, 500 U.S. 173, 179 (1991), upholding restrictions on the speech of private doctors who have no connection to the government other than the receipt of federal funding under Title X of the Public Health Services Act. The Court held that the government was entitled to prohibit recipients of federal funds from advising patients about

abortions or providing referrals for abortions because those activities are outside the scope of Title X. *Id.* at 193-94.

As in those cases, an analysis of BSA's relationship with the government is important in determining whether BSA should be permitted to use the First Amendment as a shield against anti-discrimination laws. In evaluating the associational rights of membership organizations, those organizations that are truly private should be entitled to protection of both the content of their message and the choice of their members, whereas organizations that are substantially entangled with the government should be entitled to "only minimal constitutional protection" of their exclusionary membership policies. *See Roberts*, 468 U.S. at 632-34 (O'Connor, J., concurring).

This approach would be consistent with Justice O'Connor's concurring opinion in *Roberts*. Justice O'Connor focused on the fundamental attributes of an organization and suggested that the Court draw a distinction between commercial associations, entitled to "only minimal constitutional protection of [their] recruitment, training, and solicitation activities," *Roberts*, 468 U.S. at 634, and non-commercial associations "engaged exclusively in protected expression" and therefore entitled to "protection of both the content of [their] message and the choice of [their] members." *Id.* at 633. Under Justice O'Connor's analysis, to be entitled to First Amendment protection, a group must be so "predominantly engaged in protected expression" that "state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard." *Id.* at 635-36. Justice O'Connor reasoned that commercial groups are not so predominantly engaged and stated that "[a]n association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Id.* at 636.

BSA relies on Justice O'Connor's approach in *Roberts* to argue that because it is a non-commercial association, it should receive

the highest level of First Amendment protection. Pet. Br. 34-35. BSA's argument, however, myopically reduces the freedom of expression analysis to a narrow focus on a single factor. Justice O'Connor warned that the standard for determining where an organization falls on the spectrum of First Amendment protection "cannot . . . be articulated with simple precision," *Roberts*, 468 U.S. at 635, and the commercial/non-commercial distinction cannot be the sole and definitive factor in this determination. Indeed, it is equally important to consider the degree to which an organization is entangled with the government, as this Court previously has done. Although BSA is not a commercial enterprise, it is so extensively intertwined with government that it should receive only "minimal constitutional protection" of its expressive association rights. *See id.* at 633-36.

Just as a commercial group avails itself of the benefits of the marketplace and thus loses some of its associational protections, a group such as BSA that chooses to avail itself of government benefits and privileges, is supported and sponsored by the government, and holds itself out as being associated with the government, has entered the public arena and has thus lost "the complete control over its membership that it would otherwise enjoy if it confined its affairs" to the private arena. *Id.* at 636. BSA has chosen the public arena and must play by its rules. Those rules include anti-discrimination laws such as the LAD, which are applicable to the governmental entities with which BSA is so closely connected. At the very least, having sought and received government participation, sponsorship, and funding, BSA should have to prove — and has failed to do so — that the LAD places an actual burden on an actual expressive purpose held by BSA's five million plus members.

C. Application of the LAD to BSA's Discriminatory Practices Does Not Infringe Upon BSA's Freedom of Intimate Association.

Nor does application of the LAD to BSA's discriminatory practices infringe upon BSA's freedom of intimate association. The First Amendment right of intimate association protects "those relationships, including family relationships, that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life.' " *Rotary*, 481 U.S. at 544 (quoting *Roberts*, 468 U.S. at 619-20). Criteria to be considered in determining whether an organization is "sufficiently personal or private" to warrant First Amendment protection include "size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Id.* (citing *Roberts*, 468 U.S. at 620).

The New Jersey Supreme Court correctly found that BSA is large and non-selective. *Dale*, 734 A.2d at 1221. The Boy Scouts is an organization of nearly five million youths and over one million adult volunteers.[16] Since BSA's inception in 1910, more than 99 million young people have been involved in scouting. *News Release: Scouts Present Report to the Nation* (visited Mar. 27, 2000) <http://www.scouting.org/press/990422/index.html>. Rather than choosing its members selectively, BSA has "made a commitment to ensure that its membership is 'representative of all of the population.' " *Dale*, 734 A.2d at 1221. BSA advertises to the public without restriction, attempting to expand scouting to include as many boys as

16. BSA, *1998 Annual Report* (visited Mar. 27, 2000) <http://www.scouting.org/excomm/98annual/yir1998.html>; *Fact Sheet: What Is Boy Scouting?* (visited Mar. 27, 2000) <http://www.bsa.scouting.org/factsheets/02-503.html> (Boy Scouts had over 500,000 leaders in 1998); *Fact Sheet: What Is Cub Scouting?* (visited Mar. 27, 2000) <http://www.bsa.scouting.org/factsheets/02-502.html> (Cub Scouts had over 500,000 leaders in 1998).

possible. *Id.* It is hard to imagine many organizations that are less intimate than BSA.[17]

In addition to BSA's large size and lack of selectivity, the extent of BSA's relationships with the government demonstrates that BSA membership is not truly "intimate" or "private." Rather, BSA has a public character similar to the public entities with which it associates. BSA was chartered by the federal government and receives myriad benefits by statute from federal, state and local governments. BSA reports to Congress annually and also traditionally reports to the President of the United States. BSA itself promotes extensively its ties to the government in its effort to recruit new Scouts.

Even at the local level, BSA maintains extensive ties with governments at all levels. Boy Scout troops receive privileges from federal and state governments. They use public facilities for meetings, recruiting and activities. Boy Scout troops are sponsored by public schools, police departments, fire departments, and numerous other public agencies. BSA has opened its doors to the government, accepted a wealth of public resources from the government, acted in partnership with the government, and actively promoted its associations with the government. In doing so, it has taken on a public quality that renders BSA the antithesis of the "intimate or private relationship[]" that "led to an understanding of freedom of association as an intrinsic element of personal liberty." *See Roberts*, 468 U.S. at 620.

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17. The mere fact that it may be a parent's decision to place her children in the Boy Scouts does not make BSA an intimate association. Many parents choose to place their children in public schools, but the First Amendment does not exempt public schools from anti-discrimination laws. Although parents have a constitutional right to send their children to organizations such as Boy Scouts, they have no constitutional right to provide their children with a scouting experience that is "unfettered by reasonable government regulation." *See Runyon*, 427 U.S. at 177-78.

D. The Court Should Not Expand First Amendment Rights to Intrude Upon State Sovereignty.

Finally, New Jersey "enjoys broad authority to create rights of public access on behalf of its citizens." *See Roberts*, 468 U.S. at 625. Thus, BSA should not be permitted to hide behind the First Amendment to exempt itself from New Jersey's Law Against Discrimination. *Cf. Acara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986) (noting the "fallacy of seeking to use the First Amendment as a cloak for obviously unlawful . . . conduct by the diaphanous device of attributing protected expressive attributes to that conduct").

This Court has recently affirmed in a variety of contexts the rights of states to retain a significant degree of sovereignty over their own affairs. *See, e.g., Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (upholding the state's sovereign immunity from suits by private individuals under the ADEA); *Alden v. Maine*, 527 U.S. 706 (1999) (finding that the Constitution prohibited Congress from subjecting a state to suit in state court without its consent); *United States v. Lopez*, 514 U.S. 549 (1995) (prohibiting Congress from forcing states to comply with the Gun-Free School Zones Act); *New York v. United States*, 505 U.S. 144 (1992) (finding that Congress could not require states to provide for disposal of radioactive waste); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (ruling that Congress could not infringe on the state's right to determine the qualifications of its government officials).

Remedying the evils of discrimination is one of the areas that goes to "the heart of representative government" on the state level. *Gregory*, 501 U.S. at 461 (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)). Many federal anti-discrimination statutes recognize the states' historical interest in remedying discrimination by requiring that victims exhaust state remedies or notify the state before seeking federal relief. *See, e.g.*, 42 U.S.C.A. § 2000a-3(c) (Supp. IV 1994) (requiring notification to state before discrimination victim can seek remedy under federal statute); 42 U.S.C.A. § 2000e-5(c)

(Supp. IV 1994) (providing that no charge of discrimination may be processed by the EEOC until the state remedy has first been invoked). New Jersey has exercised its sovereignty by promulgating an anti-discrimination law that on its face clearly applies to BSA. *See Gregory*, 501 U.S. at 457 ("Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign.").

If BSA were permitted to shield its discriminatory practices behind the veil of the First Amendment, the states would be rendered powerless to combat discrimination in a variety of contexts. New Jersey has acted well within its rights and within the limits of the First Amendment in applying the LAD to the Boy Scouts. This Court should reaffirm its commitment to state sovereignty by holding that states such as New Jersey may shield their citizens from invidious discrimination in places and organizations of public accommodation, such as the Boy Scouts of America.

CONCLUSION

For the foregoing reasons, the decision of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

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